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LETTER DATED 28 JULY 1995 FROM THE SECRETARY-GENERAL ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the honour to refer to the proposal for the establishment of an international commission of inquiry in Burundi, which was most recently referred to in the statement by the President of the Security Council of 29 March 1995 (S/PRST/1995/13).

At the time the statement was made, the Secretariat had already studied various options for the establishment of such a commission. All of these gave rise to considerable difficulties. I therefore decided to investigate the alternative of proposing to the Government of Burundi the establishment of a commission of the truth, similar to the one which was such an important element in the peace process in El Salvador. I accordingly obtained the services of Dr. Pedro Nikken, who played a central role in designing the El Salvador commission (and subsequently served as the Independent Expert for El Salvador of the commission on Human Rights), and sent him on a mission to Burundi to discuss with the Government the possibility of using this option to address the problem of impunity in Burundi.

I have now received Dr. Nikken's report, a copy of which is attached. Dr. Nikken's conclusions and recommendations are contained in paragraphs 63 to 68. They can be summarized as follows:

(a) Neither a commission of the truth on the Salvadoran model nor an international commission of judicial inquiry whose mandate is limited to purely judicial matters would be an adequate response to the need to put an end to impunity in Burundi;

(b) An international judicial commission of inquiry, however, could be viable and useful if its mandate gave it powers that would guarantee that its conclusions and recommendations would be put into effect and achieve the objective of prosecuting and punishing those responsible for the assassination of the President of Burundi on 21 October 1993, for the massacres that followed and for other serious acts of violence and political crimes committed since October 1993;

(c) The international commission would have to be mandated not only to undertake a judicial inquiry but also to make recommendations of an institutional nature in the legal, political and/or administrative fields;

(d) The commission would require the cooperation of the Burundian authorities, who should, in particular, be asked to commit themselves to implementing its recommendations;

(e) The commission should be established by a resolution of the Security Council;

(f) Implementation of its conclusions and recommendations should be verified by the United Nations.

Dr. Nikken's report provides valuable clarification of measures that the international community can take to respond to the decision of the Burundian parties, in the Convention on Governance of 10 September 1994, to seek the establishment of an international judicial commission of inquiry. I agree with most of Dr. Nikken's conclusions and recommendations.

I accordingly recommend that the Security Council now adopt as soon as possible a resolution establishing such a commission with a threefold mandate as follows:

(a) To establish the facts relating to the assassination of the President of Burundi on 21 October 1993, the massacres that followed and other serious acts of violence and political crimes committed between that date and the date on which the resolution of the Security Council is adopted;

(b) To recommend modalities for the trial and punishment of persons identified by the commission as being responsible for offences investigated by it;

(c) To recommend measures of a legal, political or administrative nature, including measures requiring legislative or constitutional reform, to prevent any repetition of deeds similar to those investigated by the commission and, in general, to eradicate impunity in Burundi.

I further propose that the commission should consist of three members appointed by the Secretary-General, who would inform the Security Council of his decision in this regard, and that it should be provided with the necessary support services by the United Nations Secretariat.

It is amply clear from Dr. Nikken's report that the full cooperation of the Burundian authorities will be a necessary condition for the success of the commission's work. When the Council takes the decision to establish the commission, it may therefore wish to make clear that it expects the Burundian authorities to provide the necessary cooperation, which, on the basis of Dr. Nikken's report, can be summarized as follows:

(a) Adoption by the Government of any measures needed for the commission and its personnel to carry out their functions throughout the national territory with full freedom, independence and security;

(b) Provision by the Government of all information in its possession which is needed for the commission to carry out its mandate and free access to any official archives;

(c) Freedom for the commission to collect any information it considers relevant and to use all sources of information that it considers useful and reliable;

(d) Freedom for the commission to interview, in private, any persons it judges necessary;

(e) Freedom for the commission to visit any establishment or place without prior notice;

(f) A guarantee by the Government of full respect for the integrity, security and freedom of witnesses, experts and any other persons who help the commission in its work.

Dr. Nikken's report also discusses the action that will be necessary to put into effect the commission's recommendations. He suggests that the Government should be asked to commit itself in advance to implement those recommendations and in particular to take measures for the effective judgement of persons identified by the commission as being responsible for offences investigated by it; to institute the recommended legal, political or administrative reforms; to promote approval of legislation that may be necessary; and to accept verification by the United Nations of implementation of the commission's recommendations.

While agreeing with Dr. Nikken that such commitments by the Government would enhance the prospects for the commission to succeed in helping the Government and people of Burundi to put behind them the tragic events of recent years and to end impunity in their country, I believe that to seek such commitments now would further delay the establishment of the international judicial commission of inquiry. The Security Council may, however, wish to invite the commission to submit an interim report, at a time of its choosing, which would address in particular the question of how persons identified by it as being responsible for massacres and other political crimes should be brought to trial and in particular whether their trial should be entrusted to the Burundian judicial system or to an international tribunal.

I should be grateful if you would bring this matter to the attention of the members of the Security Council.

(Signed) Boutros BOUTROS-GHALI

Annex

[Original: Spanish]

REPORT OF THE SPECIAL ENVOY APPOINTED TO EXAMINE THE FEASIBILITY OF ESTABLISHING EITHER A COMMISSION ON THE TRUTH OR A JUDICIAL FACT-FINDING COMMISSION IN BURUNDI

I. INTRODUCTION

1. Since the abortive coup d'état and the assassination of President Melchior Ndadaye on 21 October 1993, and the massacres that immediately followed, Burundi has been going through a deep-seated crisis. The violence, the formation of militias, the summary executions and every manner of abuse against human dignity have continued unabated. Tens of thousands of persons have been murdered in countless different ways and the level of atrocities has often reached a peak of hysteria.

2. One of the elements in this scenario is the impunity which the perpetrators, instigators and abettors of these crimes have enjoyed and which is, in turn, cited as the pretext or justification for obtaining justice through the vengeance and senseless violence organized by the militias. In fact, crime with impunity is the rule in Burundi. At the present time, the courts are virtually paralysed. Moreover, large segments of society have no trust in the impartiality of the judicial system.

3. The calls for an end to this impunity have become more insistent. On various occasions, the establishment of an international judicial fact-finding commission has been proposed. Thus, the report addressed to the Secretary-General by the preparatory fact-finding mission to Burundi made up of Ambassadors Martin Huslid and Siméon Aké states as follows:

> "One proposal which deserves careful consideration, now that the preparatory Mission has completed its political inquiry, is that, with the agreement of the Government, a mission should be sent which would concentrate on the legal aspects, so as to establish more precisely the responsibility for the events of October 1993 and identify the guilty parties so that they can be brought to justice" (S/1995/157, annex, para.164).

4. Similarly, the report of the Security Council mission to Burundi dated 28 February 1995 recommended that an international fact-finding commission should be established for Burundi as soon as possible (S/1995/163, annex, para. 21). The President of the Security Council, in his address of 9 March 1995, underlined the role that such a commission might play in the investigation of the attempted coup d'état of 21 October 1993 and the massacres that followed (see S/PRST/1995/10).

5. At the national level, on 10 September 1994, the forces for democratic change (majority parties) and the political parties of the opposition in Burundi signed the Convention on Governance. This was designed to be an instrument for

management of the crisis and included, inter alia, a system for power-sharing. Article 36 of the Convention provides expressly for the establishment of such a mission:

> "Article 36. It is requested that an international judicial fact-finding mission be formed within 30 days; it shall be composed of competent and impartial persons to investigate the coup d'état of 21 October 1993 and what the political partners have agreed to call genocide without prejudice to the outcome of the independent national and international investigations, as well as the various political crimes that have been committed since October 1993" (see A/50/94-S/1995/190, annex).

6. Mr. Sylvestre Ntibantunganya, President of the Republic of Burundi, addressed to the Secretary-General a note verbale dated 24 January 1995, requesting the establishment of the judicial commission referred to in the clause quoted above. The Secretary-General despatched an appropriate reply to the President on 9 February 1995. The President's note verbale to the Secretary-General caused a controversy within the country, for procedural as well as substantive reasons. With respect to the former, the opposition parties claimed that, contrary to the terms of the Convention on Governance, they had not been consulted regarding the communication. As to the substantive reasons, the opposition objected to the terms of reference proposed by the President, claiming that they should also be the subject of a political agreement. This controversy brought matters to a stalemate which has not yet been resolved.

7. One of the options proposed for ending this stalemate was the appointment in Burundi at an early date of a "commission on the truth" similar to the one established in El Salvador. The Secretary-General saw fit to entrust to me the mission of determining whether the relevant national entities in Burundi were prepared to establish such a commission on the truth. During my visit to Burundi, I received the additional mandate of studying the feasibility of a judicial fact-finding commission as an alternative to a commission on the truth.

8. In order to carry out the mission, I made a preliminary visit to Bujumbura from 28 June to 9 July 1995, during which I had interviews with the persons mentioned in the appendix to this report. Most of them had been suggested by the Special Representative of the Secretary-General, Ambassador Ahmedou Ould Abdallah, who, together with his team, gave me any necessary assistance.

9. Against this background, I shall attempt in this report to determine, firstly, whether the relevant national entities in Burundi are prepared to establish a commission on the truth, such as was established in El Salvador, and secondly, whether a judicial fact-finding commission might be an alternative to a commission on the truth.

10. This involves consideration of two sets of questions. The first is aimed at determining whether one or other of the two types of commission is viable and relevant. The second presupposes that at least one of them is, even though it may be a makeshift arrangement, since reference is made in either case to the mandate on which such a commission should be based.

II. VIABILITY OF A FACT-FINDING COMMISSION

11. The current situation in the country and the short-term outlook pose a number of problems concerning the viability of any fact-finding commission in Burundi, regardless of its title or nature. The first of these concerns the true usefulness and the need for the establishment of such a commission, as well as the risks that creating it or failing to do so imply. The second relates directly to the nature of the commission; in other words, it is the dilemma of choosing between a "commission on the truth" and an "international judicial fact-finding commission". The third concerns the procedure which may have to be adopted for the establishment of the commission. The three issues will be dealt with successively.

A. First issue: the need for and usefulness of a commission in the current social and political context

12. As noted earlier, it is clear that the political situation is extremely fragile and unstable. The Convention on Governance of 10 September 1994 established a system of power-sharing designed to ensure stability and security in the conduct of the country's affairs. However, both goals are becoming increasingly distant as polarization worsens by the day and violence, which is unremitting, threatens to become even more widespread.

13. These circumstances differ markedly from those that existed in El Salvador at the time the Commission on the Truth was set up. The same can be said with regard to Haiti's National Commission of Truth and Justice, South Africa's Promotion of National Unity and Reconciliation Commission and, in the case of the negotiations still under way in Guatemala, the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer. Each of these commissions was conceived as just one component of a much larger and more ambitious plan for the future of the country in question. Their work was supported by the political will and commitment to end a past in which violence had taken precedence over democratic values and respect for human dignity, and their investigations of that past were carried out as part of a historic plan to ensure democracy, peace and full respect for human rights. Furthermore, in the cases of El Salvador and Guatemala, it was understood that the commissions would not begin work until the peace talks had been concluded and steps had been taken to implement the political agreements reached in those negotiations.

14. Thus, in these situations, a historic turning-point was established between a past to be investigated and a future in which a mechanism to investigate that past would be put into practice. This turning-point marked the limit of the commission's competency ratione temporis. In that context, the work of the various commissions was not confined to combating the impunity which had shielded the perpetrators of numerous crimes and acts of violence in the preceding period, but also sought to ensure that changes were irreversible and that the country would never revert to the situation of rampant crime uncovered by the commission.

15. In Burundi, however, any commission that might be established would be an isolated mechanism unsupported by definite plans for the country's future. The "national debate", through which comprehensive solutions could be devised for the future, is still in an embryonic state. Consequently, the commission would have to work under conditions of continuing violence in which hate, fear and extreme polarization overshadow all hope and stand in the way of progress.

16. Therefore, unless action is taken to step up efforts to find comprehensive solutions to Burundi's national crisis, the work of the proposed commission will be limited, in principle, to ending impunity and punishing the guilty parties through the judicial system. For that matter, both the Government and the opposition are unanimous in demanding that this goal be met.

17. These circumstances entail serious risks. As noted earlier, the legal system is weak and there are signs that its impartiality is in doubt. In addition, some of the crimes to be investigated come under military jurisdiction and their alleged perpetrators could only be tried by military tribunals.

18. It is possible, then, that no matter how irrefutably the commission may elucidate the crimes it investigates, Burundi's justice system might not punish the culprits or might punish them according to criteria that could seem discriminatory to some sectors of society. Such an outcome could be catastrophic. An objectively established "truth" that does not give rise to consequences or hope would be extremely dangerous in the country's current situation, since it would encourage the sense of impunity of those who escape justice, thereby inducing them, in a way, to repeat their crimes. This, in turn, could accentuate existing feelings of frustration and hate and encourage the view that revenge is the only means of obtaining justice, causing violence to escalate beyond all control.

19. This is, therefore, a question of paramount importance, given its extreme sensitivity. The establishment of an international commission in Burundi, regardless of its name or functions, to investigate the serious crimes that have taken place must be accompanied by all possible precautions and measures to avoid such an outcome.

20. It is necessary, then, to determine what precautions might be taken and to include them in the proposed commission's terms of reference, since, despite the risks involved, the establishment of such a commission within an appropriate framework seems useful, necessary and even urgent, for a number of reasons. First, the commission would be an appropriate means by which moderate sectors could try to contain extremists and all those who advocate a vendetta as a means of securing justice; or, at least, to limit or reduce the audience to whom they address their message of hate and violence. Second, despite the risks involved, within the proper framework the commission could truly become the catalyst for ending the impunity that still prevails in the country. Third, the mission provided for in article 36 of the Convention on Governance was a sine qua non of that political agreement. Lastly, the mission is the only mechanism of the Convention on Governance in which the international community has been called upon to play a role, and it would be unthinkable for the latter to fail to make every effort to fulfil that commitment under reasonable conditions, given the

tragic circumstances currently plaguing Burundi. The second issue to be addressed concerns the name and functions of the proposed commission.

B. Second issue: name and functions of the commission

21. The task entrusted to me was that of determining, on the one hand, whether the relevant national entities in Burundi are prepared to institute a commission on the truth similar to the one set up in El Salvador; and, on the other, whether a judicial fact-finding commission could be established as an alternative to a commission on the truth. Below is a review of each option's viability and effectiveness, followed by an examination of possible solutions to the problems detected.

1. A commission on the truth

22. Consultations in this regard revealed reservations and even distrust with respect to the possible establishment of a commission on the truth. I noted many prejudices against the creation of an entity known by this name, first, because it is seen as an attempt to replace something that was already the subject of an internal political agreement, namely the "international judicial fact-finding mission" provided for in article 36 of the Convention on Governance, cited above; and second, because there are doubts, unfounded in my opinion, about the effectiveness of any mechanism called a "commission on the truth". The feeling is that this type of commission is empowered to report the facts but not to reveal the identity of those responsible, who would continue to enjoy impunity. Another belief is that the idea of a commission on the truth is necessarily linked to amnesty. These are serious misconceptions that are not easy to dispel.

23. In these circumstances, the first priority was to ask whether this resistance had more to do with the name of the mechanism than with the mechanism itself. The point was not to argue about the name, but to determine whether the terms of reference of the Salvadoran experiment could be adapted to the situation and needs of Burundi. If the problem was limited to the name, it would not be a serious obstacle and the substance of the mechanism could remain intact. It is clear, in fact, that if an unknown "truth" is to be brought to light, some kind of "fact-finding" or "investigation" is needed. It would therefore be inappropriate to conclude a priori that there are insurmountable differences between El Salvador's Commission on the Truth and an international judicial fact-finding mission. On the contrary, before drawing any conclusions, it is important to ask whether both proposals can be combined into one.

24. To this end it was necessary, first of all, to break down and analyse the components of the Commission on the Truth established in El Salvador to determine whether they could also constitute the terms of reference of the international judicial fact-finding mission mentioned in Burundi's Convention on Governance.

25. For this purpose, the relevant components of El Salvador's Commission on the Truth can be summarized as follows:

(a) A political agreement between national counterparts which established the Commission, defined the scope of its mandate and, in general, laid down its terms of reference;

(b) An international commission consisting of three people designated by the Secretary-General of the United Nations;

(c) An inquiry aimed at investigating the serious acts of violence committed during the civil war waged in that country since 1980, whose impact on society urgently demanded that the public should know the truth. The outcome of this inquiry included the identification, by name, of the individuals who had committed, instigated or covered up those acts. This task was energetically pursued with the support of a team of specialists and with suitable means of clarifying the facts investigated. However, to guarantee the witnesses' safety, the Commission refrained, in general, from revealing the sources of the information on which it had based its conclusions;

(d) A mandate that empowered the Commission to make recommendations on legal, political and administrative measures that seemed necessary in the light of the results of the inquiry. These recommendations could include measures to prevent the recurrence of such acts, as well as steps towards national reconciliation. In other words, the Commission was formally empowered to make legal recommendations, including, undoubtedly, demands that those responsible for the acts it had investigated and described in its report be tried and punished for those crimes. In fact, the Commission explicitly stated that:

> "One of the direct consequences of the clarification of the serious acts which the Commission has investigated should, under normal circumstances, be the punishment which those responsible for such acts deserve" (S/25500, annex, p. 177).

However, it added that:

> "The question is not whether the guilty should be punished, but whether justice can be done. Public morality demands that those responsible for the crimes described here be punished. However, El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably. This is a part of the country's current reality and overcoming it urgently should be a primary objective for Salvadorian society.
>
> "The Commission does not believe that a reliable solution can be found to the problems it has examined by tackling them in the context which is primarily responsible for them. The situation described in this report would not have occurred if the judicial system had functioned properly ... That being the current situation, it is clear that, for now, the only judicial system which the Commission could trust to administer justice in a full and timely manner would be one which had been restructured in the light of the peace agreements" (ibid., pp. 178-179).

It should be emphasized that the fact that the Commission's report did not lead to the trial and punishment of the culprits was not a consequence of the nature

of the Commission itself. On the contrary, its mandate empowered it to recommend legal measures and, therefore, to bring the guilty parties to justice. It was the report of the Commission, not its terms of reference, that determined that such trials were impracticable. Thus, there are no grounds for affirming that El Salvador's Commission on the Truth was, a priori, a mechanism for elucidating the facts without bringing the perpetrators to justice;

(e) A commitment by the signatories to the agreement to implement the Commission's recommendations;

(f) International verification of the implementation of the Commission's recommendations.

26. A number of the above conditions would apply in the case of the body which is expected to be set up in Burundi: (a) an international commission; (b) an inquiry into acts of violence, in order to shed light on the incidents and to identify those who carried out, instigated or abetted them; (c) a mandate giving the commission authority to make any recommendations which may arise out of the results of the inquiry; (d) international verification.

27. However, certain points of divergence can be observed. There is not yet political agreement in Burundi regarding the terms of reference of the mission referred to in article 36 of the Convention on Governance; that implies that there is also no explicit commitment to put its conclusions and recommendations into practice. There is also the question of the nature of the investigation or inquiry, since in Burundi it is strongly felt that it must be "judicial", although the meaning of that description has not been clearly specified. Also, according to the terms in which the mission referred to in article 36 of the Convention on Governance has been envisaged, it would not be sufficient for it to be empowered to make recommendations of a legal or judicial nature; its work would necessarily lead to the judgement and punishment of those responsible. Thus, the conclusions of El Salvador's Commission on the Truth regarding judicial procedures would have no place in Burundi.

28. In the light of these differences, as well as those arising from the historical context, and bearing in mind the reservations and opposition referred to above, it must be concluded that a "commission on the truth" based entirely on the Salvadoran model is not currently viable in Burundi.

2. An international judicial fact-finding commission

29. Article 36 of the Convention on Governance refers to an "international judicial fact-finding mission". It is the same entity referred to in the note dated 24 January 1995 from the President of the Republic to the Secretary-General. The terms of reference of such a mission have not been the object of a consensus within the country; but that does not prevent us from making some observations regarding the scope and the usefulness of such a mechanism, in accordance with the mandate usually conferred upon it.

30. Firstly, it has to be made clear that it is not an international tribunal, competent to judge any offence, even if it were to be concluded that one of the

incidents under investigation constituted a crime against humanity, as would be the case for genocide. Nor is it an investigative commission which has to content itself with establishing that particular events have or have not taken place.

31. The "judicial" connotation of such a commission would indicate that it has to carry out an inquiry into certain events; determine their legal consequences, particularly the judicial procedures to be applied to the persons presumed to be responsible for punishable acts; and state which are the entities competent to implement those judicial procedures, which would normally be the authorities of Burundi, except that if genocide had been committed, it would be appropriate to constitute an international criminal tribunal.

32. For that purpose, the commission would have to be empowered to collect information of all types; receive sworn statements, and also testimony in the judicial sense of the expression; carry out inspections wherever it deems appropriate; and, generally speaking, gather the necessary evidence in accordance with the laws of Burundi, so that the suspects could be tried and impunity brought to an end.

33. Such a mechanism, applied in its strictest sense, does however present a number of practical drawbacks which make its implementation inadvisable in these circumstances. Firstly, it should be pointed out that one reason for having recourse to an international tribunal is precisely because of the weakness of the national judicial system, which has not succeeded in punishing anyone for the serious crimes committed since independence. Furthermore, as I have already mentioned in this report, large sectors of society distrust the impartiality of the courts. The mere establishment of an international judicial fact-finding commission does not seem sufficient to alter that situation.

34. In addition, the commission would be responsible for collecting the case records, that is, gathering evidence in the judicial sense of the term. Its moral conviction, or the evidence given by persons whose anonymity has to be protected, would not be sufficient. The evidence would have to be valid before the country's own courts. This gives rise, in practical terms, to a serious difficulty, at least in respect of evidence given by witnesses. In the present situation, it is essential to protect the witnesses. Their identity, save for any who specifically expressed their wishes to the contrary, would have to be kept secret. Testimony would be difficult to obtain inside the country unless the proceedings took place within a framework of strict confidentiality; this implies that no testimony would be given in public, that there would be no cross-examination of witnesses, and that testimony would not be given in any fixed location.

35. Unless appropriate reforms are introduced in the laws of Burundi, it is hard to imagine how the moral conviction of the international commission, based on evidence collected in such conditions, could constitute admissible evidence before the Burundian courts.

36. Theoretically, this is not necessarily an insurmountable problem. Evidence from witnesses is important, but it is not the only type of evidence that is valid in a trial. There are previously existing sources of information, such as

those in the possession of the preparatory fact-finding mission to Burundi, consisting of Ambassadors Martin Huslid and Siméon Aké; or the reports and evidence gathered by non-governmental organizations. In addition, most legal systems acknowledge that a combination of several serious, precise and consistent pieces of evidence, even if some of it is unsubstantiated, can add up to conclusive proof before a court.

37. In practice, however, if the international commission as described above confined itself in its report and recommendations to establishing the facts and their legal consequences, the Burundian courts may well conclude that the commission's work is insufficient to nullify the presumption of innocence to which the accused will, in any event, be entitled. Thus, we would be faced with an extremely dangerous situation in which the commission's work would serve to elucidate the crimes which it investigated, but the national judiciary would not punish the criminals, or would punish them in accordance with criteria which might be perceived as discriminatory.

38. In the present situation in Burundi, an international judicial fact-finding commission, with a mandate restricted to reaching conclusions of a purely legal nature, is therefore neither advisable nor viable as an effective mechanism for putting an end to impunity.

39. It could, on the other hand, be a viable and useful mechanism if its terms of reference and the content of its mandate also included the ability to make institutional recommendations, and if the national authorities would give a reasonably firm guarantee that those recommendations would be put into practice. The content of the mandate of any international judicial fact-finding commission would have to be adapted to the particularities of the current situation in Burundi in order to include provisions guaranteeing that its conclusions and recommendations would be implemented. The terms of reference that will be referred to in section II of this report include suggestions for that purpose. However, before we go on to examine that subject, we have to consider the third issue: the make-up of the commission.

C. The third issue: the procedure for determining the make-up of the commission

40. As we have said a number of times, while the Convention on Governance foresaw the establishment of an international judicial fact-finding mission, it did not define the latter's terms of reference. In order to achieve that goal, we can consider two possible options: an agreement among the signatories to the Convention on Governance, or a resolution of the Security Council.

(a) The commission - Agreement

41. There are a number of undoubted advantages in establishing the commission's terms of reference by means of a national agreement, not only because of the political support that would afford the commission, even before it was established, but also because it would be possible to secure, from the very outset of its activities, a commitment that whatever recommendations it might make would be implemented.

42. However, it may be difficult to obtain such an agreement in the short term. The President of the Republic has appointed a technical commission to achieve that objective and I was informed in the field that the prospects of reaching such an agreement were reasonably good. I am not entirely convinced that there are solid grounds for such optimism and I believe that the negotiations may take some time. Furthermore, there is no guarantee either that the terms of reference that might emerge from such an agreement would meet the conditions on which the United Nations would be willing to commit itself to that process; that would give rise to a further delay before the commission was finally in place.

43. One of the reasons given in this report for the conclusion that establishing the commission, within an appropriate framework, seems useful, necessary and even urgent, is that the commission is an appropriate means whereby the moderate elements could endeavour to curb the extremists. Consequently, if the definition of its terms of reference were to be conditional on the outcome of a difficult, protracted and uncertain process of negotiation, the commission itself would lose part of its usefulness. Should it therefore be established through a procedure other than an agreement?

(b) The commission - resolution of the Security Council

44. The commission may be established by a resolution of the Security Council. An international judicial commission of inquiry was suggested in the report of the preparatory fact-finding mission to Burundi, dated 20 May 1994 (S/1995/157, annex, para. 164). The same proposal was made in the report of the Security Council's mission to Burundi of 28 February 1995 (S/1995/163, annex, para. 21). The President of the Security Council, in his statement of 9 March 1995, also emphasized the role that such a commission might have in investigating the attempted coup d'état of 21 October 1993 and the massacres which followed (see S/PRST/1995/10).

45. Furthermore, all the reports prepared in connection with acts of violence that have swept through the country since then indicate that serious, systematic and widespread violations of human rights have been committed and that international law has been violated. Similarly, the Convention on Governance of 10 September 1994 states repeatedly that what has occurred may constitute genocide (see A/50/94-S/1995/190, arts. 11, 24, 29, 36 and 40).

46. Moreover, according to article 36 of the Convention on Governance, which has been referred to several times, the request comes from the country itself. The Convention was signed by the Special Representative of the Secretary-General, as an international observer. Lastly, article 54 provides that the Secretary-General shall be a depositary of the Convention.

47. Thus the formal framework needed for an initiative of this nature by the Security Council does exist; proceeding thus would have the undeniable advantage of making it possible to move faster towards the establishment and actual setting up of the international judicial commission of inquiry. However, suitable precautions must be taken to ensure the cooperation of the national authorities; this cooperation is indispensable if the commission is to act within an appropriate framework and to be truly useful in putting an end to impunity in Burundi.

III. TERMS OF REFERENCE OF THE COMMISSION

48. The above considerations make it clear that, under certain conditions, establishing the international judicial commission of inquiry in Burundi is a viable option. The terms of reference that will be set out below are based on these same considerations. The objective is to establish an impartial international commission whose mission will be to investigate and clarify facts and to recommend judicial and institutional measures based on its findings in order to put an end to impunity; the measures to be adopted shall be subject to verification by the United Nations. The commission's composition, its mandate and the attention paid to the outcome of its work should be designed in such a way as to enable the commission to perform two essential tasks, failing which it would be of no use and have no purpose. It should, first and foremost, be an international commission that will investigate the serious acts of violence that have occurred in Burundi since the attempted coup d'état of 21 October 1993; but it must also be a commission that will put an end to impunity.

A. A commission of inquiry

1. Composition and appointment of the commission

49. A neutral and impartial international commission shall be established. It must comprise legal experts of unimpeachable integrity, impartiality and objectivity. It will be appointed by the Secretary-General of the United Nations. For reasons of a practical nature, it should have no more than three members.

2. Facts to be investigated

50. According to article 36 of the Convention on Governance, the commission will be called on to investigate three types of events: (1) the putsch of 21 October 1993; (2) the events which the signatories of the Convention have agreed to call genocide, without prejudice to the outcome of independent national and international investigations; and (3) the various crimes having political implications that have been committed since October 1993. The first two cases do not raise any particular doubts; they concern the events of 21 October 1993 and the massacres that ensued. The third, however, warrants a number of observations. In the first place, it is difficult to define precisely, in the context of Burundi, what is a crime having political implications, since offences which normally would be regarded as offences under the ordinary law are not excluded from the inquiry. In the second place, it must be borne in mind that the Convention on Governance was signed in September 1994 and that article 36 envisaged that the "international mission" would be set up within the next 30 days. That was not done and the acts of violence have continued without interruption and have included further serious violations of and threats to human rights. It would be inadmissible and indefensible to try to interpret article 36 of the Convention on Governance restrictively, and to claim that a political agreement would prevent the commission from investigating and clarifying such acts of violence, whatever their "implications". It would be desirable, in this context, for the mandate

of the commission to mention specifically that the inquiry covers "all serious acts of violence and the various crimes with political implications committed since October 1993".

3. Purpose of the inquiry

51. To clarify the above-mentioned facts, to identify the alleged perpetrators and to collect the evidence necessary to prosecute and punish them. This statement requires, in its turn, a number of clarifications.

52. With respect to the facts, it is now established that there have been a great many acts of violence and that it is extremely difficult, if not impossible, to clarify all of them. The commission will have to focus its attention on the most important incidents, in terms of their seriousness, their characteristics, their historical significance or the social disturbances to which they have given rise.

53. With respect to the identification of the alleged perpetrators, it is also evident that there arises a problem of scale and of varying degrees of responsibility. The investigation must focus on those who bear the greatest degree of blame in the organization, planning, instigation or implementation of the acts investigated by the commission.

54. As regards the collecting of evidence, the commission may use all types of evidence. With regard to testimonies, the commission should take appropriate measures in each case for the protection and safety of witnesses, even if such measures are prejudicial to the ultimate value of the evidence.

4. Organization of work

55. The commission must have full powers to freely organize its work, which shall be carried out at all times on a basis of strict confidentiality. It shall have suitable staff, with the support of the international community.

5. Powers

56. For the purposes of the inquiry which it is required to conduct, the commission shall have broad powers, including the power to:

(a) Collect, by such means as it deems appropriate, any information it considers relevant. The commission shall have full freedom to use all sources of information which it considers useful and reliable, both within and outside the country.

(b) Request reports, files, documents or any other information which may be helpful in the discharge of its duty, from the State authorities and services in possession of them; and to have access to any official archives.

(c) Interview, freely and in private, any persons, groups or members of bodies or institutions.

(d) Enjoy complete freedom of movement within the country and be able to visit freely any establishment or place without prior notice.

(e) Take any other steps or conduct any investigation which it considers useful for the fulfilment of its mandate.

B. A commission to put an end to impunity

57. At no time should it be forgotten that it is because of the climate of impunity prevailing in Burundi that this commission is needed. It cannot, therefore, confine itself to submitting a report clarifying the details of the acts investigated and identifying the alleged perpetrators. It must also be empowered to make recommendations aimed at ensuring that the latter are indeed brought to trial in strict accordance with the law, and promoting the institutional changes that are necessary to eradicate impunity in the future. This also means that, once the report has been submitted, appropriate measures will have to be taken to provide for the international verification of the implementation of the commission's recommendations.

1. Reports of the commission

58. The commission may submit preliminary reports to the Secretary-General when it deems this necessary to advance its work or when it decides to make recommendations prior to the submission of its final report. It may also do so when it judges it appropriate to refer to the cooperation which it receives from the authorities of Burundi and the signatories to the Convention on Governance in the discharge of its duty and the adoption of its recommendations.

59. The commission's final report shall contain: (a) a description of the events investigated, with its conclusions and supporting facts and evidence; (b) the characterization of the crimes committed, particularly if genocide or any other crimes against humanity have taken place and if, as a result, the alleged perpetrators should be brought before an international tribunal; (c) the identification of those responsible for any other crimes referred to during the course of the inquiry and the recommendations which it considers appropriate in order to ensure that they are brought to trial; (d) recommendations concerning measures of a legal, political or administrative nature which may be based on the commission's findings and conclusions and which should include measures aimed at preventing the recurrence of such acts and, in general, at eradicating impunity in Burundi.

60. The final report shall be submitted to the President of the Republic and to the Secretary-General of the United Nations who shall render it public and shall take such decisions or measures as he may deem appropriate. A copy of the report shall also be submitted to the Attorney General of the Republic.

2. Recommendations of the commission

61. In addition to the recommendations contained in its final report, the commission shall be empowered to make recommendations even before the submission of its report. The commission must be in a position to ensure, as far as possible, that the conclusions of its final report are translated into action. The commission's work must be accompanied by the internal institutional reforms that are required for the trials to effectively take place and for the rules of due legal process to be strictly observed. This means that the commission must enjoy a certain flexibility with respect to deadlines and dates for the submission of its final report. Moreover, the possibility must be left open for the commission to make the submission of its report conditional on the implementation of its previous recommendations. In any case, before the commission is established, it is necessary to obtain a commitment from the appropriate authorities that all the recommendations of the commission will be strictly implemented.

3. International verification by the United Nations

62. The Secretary-General shall adopt the verification measures which he considers necessary to ensure that the commission's conclusions and recommendations are respected and implemented. These measures may include the presence of international expert observers to monitor closely the trials being held in national courts and, where necessary, to provide such support and assistance as may be required. The Secretary-General shall keep the Security Council informed.

IV. CONCLUSIONS AND RECOMMENDATIONS

63. A commission on the truth patterned exactly on the Salvadoran model does not appear to be viable in Burundi at the present time. Likewise, an international judicial commission of inquiry, whose mandate is limited to purely judicial matters, is neither advisable nor viable in the present situation of the country, as an effective mechanism to put an end to impunity.

64. However, if its mandate meets the appropriate requirements, the establishment of an international judicial commission of inquiry in Burundi may be useful and necessary to effectively combat the impunity which has existed in the country and particularly to prosecute and punish those responsible for the attempted coup d'état and the assassination of President Melchior Ndadaye and several of his collaborators, on 21 October 1993, the massacres which followed immediately and the serious acts of violence and various political crimes committed since October 1993. It may also represent the international community's contribution towards increased prospects for the eradication of impunity in the future and for the restoration of peace to the country.

65. The viability and usefulness of this commission depend on whether its mandate includes powers which guarantee that its conclusions and recommendations will be put into effect and achieve the objectives set out in the preceding paragraph. This means that it should also be empowered to make recommendations

of an institutional nature in the legal, political or administrative fields, both in its final report and even before the completion and submission of its report.

66. In order to achieve this objective, the cooperation of the relevant authorities of Burundi is required. Such cooperation should include an explicit commitment to implement the commission's recommendations.

67. The commission may be established by a resolution of the Security Council based, firstly, on the steps already taken by the United Nations recommending the establishment of such a body; secondly, on all the available information which indicates that serious, systematic and widespread violations of human rights have been committed and that international law has been violated; and, thirdly, on article 36 of the Convention of Government, which expressly calls for the establishment of such a commission.

68. Implementation of the commission's conclusions and recommendations should be subject to United Nations verification, using all means necessary for this purpose; these may include the presence of international expert observers to monitor closely the trials in progress before national courts and, where necessary, to provide such support and assistance as may be required.

APPENDIX

During my stay in Bujumbura, I had the opportunity to meet with the following persons:

PUBLIC FIGURES

H.E. NTIBANTUNGANYA, Sylvestre, President of the Republic

H.E. NDUWAYO, Antoine, Prime Minister

BANSUBIYEKO, Mamès, Chef de Cabinet of the President of the Republic

BARIBWEGURE, Janvier, Judge Advocate, Lieutenant-Colonel

BUTASI, Jean-Bosco, Attorney General of the Republic

BUYOYA, Pierre, former President of the Republic

DARADANGWE, Jean-Bosco, Director-General of Social Affairs and Communication in the Ministry of National Defence, Lieutenant-Colonel

FYIROKO, Gédéon, Chef de Cabinet (military affairs) of the President of the Republic, Colonel

KANYENKIKO, Anatole, former Prime Minister

MUJAWAHA, Marcienne, Minister of Human Rights, Social Welfare and the Advancement of Women

NAHAYO, Diomède, President of the Supreme Court

NAHINDAVYI-NDANGA, Alphonse, Secretary-General of the National Assembly, accompanied by

NDORICIMPA, Rogatien, NDIKUMANA, Innocent, NDIKUMANA, Nephtalie and BAMVUGINYUMVIRA Frédéric, FRODEBU parliamentarians

NDABITOREYE, Audifax, Director of Documentation

NDIKUMASABO, Vincent, President of the PSD party and Minister of Public Service

NDORICIMPA, Léonidas, Vice-President of the UPRONA party

NGENDAKUMANA, Léonce, President of the National Assembly

NGENZEBUHORO, Frédéric, President of the UPRONA parliamentary group, accompanied by

NDIKUMANA, Victoire, KADEGE, Alphonse Marie and SIBOMANA, Adrien, UPRONA parliamentarians

NTAHOBAMA, Melchior, Minister of Justice and Attorney General

NTAMWANA, Msgr. Simon, Catholic Bishop of Bujumbura

RUGAMBARARA, Alphonse, President of the INKINZO party and Minister of Youth, Sport and Culture

SINARINZI, Gabriel, Minister of the Interior and Public Security

DIPLOMATIC CORPS

Belgium
Federal Republic of Germany
France
United States of America